appeal judge reference was made to the judgment of Thomson J. (as he then was) in *Hiew Kim Swee* v. *G. C. Gomes.*[1] The headnote to the report clearly suggests that this was an action for possession and what was said in that case could have no application to the facts of the present case. It was cited by counsel for the respondent at the commencement of the trial as though it was an authority for the proposition that the magistrate should hear the case in order to decide whether or not he had jurisdiction. What in effect was decided by the former Lord President is clearly stated in the words of his judgment appearing on page 174:—

"As this is the first occasion on which this question of jurisdiction has been litigated, I think I should make it clear for the benefit of magistrates who will, no doubt, look to what I have said that I am not deciding that in every case it is necessary for the magistrate to try the case out to the very end before deciding whether or not he has jurisdiction. What I am deciding is that the question is not necessarily and exclusively to be decided on the pleadings."

If sufficient consideration had been given to these words it might well be that the trial magistrate would have been in a position to decide the question of jurisdiction on the pleadings alone after taking into account the effect of section 116 of the Evidence Ordinance or the applicability of sub-section (4) of section 70 of the Courts Ordinance having regard to the nature of the claim. I am not saying that the trial magistrate had seriously erred in deciding to hear evidence, but what happened after the evidence was given was to bring into the open a dispute as to title which led the learned appeal judge to the view that the trial magistrate had no jurisdiction in the case. In the course of his judgment in the case cited the former Lord President gave three sets of circumstances to illustrate the stage at which the trial magistrate should consider his jurisdiction to be at an end. None of the circumstances given can be said to be analogous to the circumstances of the present case, assuming of course that the question of title could properly be raised. Having said this I do not think there is anything else to be said about that case.

I would allow this appeal with costs and order that the respondent shall pay the costs of the appeal before the learned appeal judge and of the trial before the magistrate.

Barakbah L.P. and **Ismail Khan J.** concurred.

Appeal allowed.

Judgment of the trial magistrate restored.

Solicitors: *D. A. Devadason; Allen, Gledhill & Ball.*

PUBLIC PROSECUTOR v. LIM AH LENG

[R.Cr.J. (Ong Hock Sim J.) February 21, 1967]
[Penang — Criminal Revision No. 3 of 1967]

Criminal Law and Procedure — Sentence — Excessive — Previous offence committed 14 years earlier when accused was 10 years old — Courts Ordinance, 1948, s. 87(2).

Penal Code, s. 83 — Effect in passing sentence.

This was a reference by a magistrate under section 37 of the Courts of Judicature Act, 1964 for confirmation of sentence passed in exercise of the special powers of punishment conferred by section 87(2) of the Courts Ordinance, 1948. The accused was at the time of the trial 24 years old and had had two previous convictions one of which was for theft committed when he was 10 years old. The magistrate in view of the two previous convictions, sentenced him *inter alia* to two years imprisonment.

Held: in view of section 83 of the Penal Code the accused could not have had sufficient maturity when the previous offence was committed. The sentence of two years imprisonment was therefore severe and did not merit the invocation of the provisions of section 87(2) of the Courts Ordinance, 1947 and a sentence of one year's imprisonment substituted.

CRIMINAL REVISION.

Ong Hock Sim J.: This case was referred to me by the learned magistrate for confirmation of the sentence which has been passed upon the respondent in excess of that prescribed as required by section 37 of the Courts of Judicature Act 1964. In view of his two previous convictions the learned magistrate had sentenced the respondent to two years imprisonment. The respondent is now 24 years of age. I find that the magistrate took into account one offence in the Juvenile Court on 11th December, 1952, 14 years ago when the respondent was only 10 years old for an offence of theft and he was sent to an approved school for 3 years. The magistrate must have considered this previous conviction so serious as to merit invoking the provisions of section 87(2) of the Courts Ordinance, 1948 for the purpose of enhancing the sentence. I do not, and am a little shocked at the severity thereof having in mind section 83 of the Penal Code which reads:—

"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion."

I wondered if the lad had sufficient maturity then. I also question the propriety of the registration of this offence under the Registration of Criminals Ordinance 1948 and order that it be expunged.

I therefore do not confirm the sentence of 2 years' imprisonment. I reduce it to one year and I set aside the fine and the order of police supervision.

Sentence altered.